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TUNKU DATO SERI SHAHABUDIN & ORS

v.

LEE TAK SUAN & ANOR

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOF JCA
ZULKEFLI MAKINUDIN JCA
LOW HOP BING JCA
[CIVIL APPEAL NO: W-02-1150-2006]

C

18 JANUARY 2008

UNINCORPORATED ASSOCIATIONS: *Societies - Suits - Derivative action by ordinary members of club against committee members - Locus standi - Whether action should be commenced by representative*

D

action instead - Whether action ought to be struck out - Rules of the High Court 1980, O. 15 r. 12, O. 18 r. 19(1)(a), (b), (d)

This was an appeal by the defendants against the decision of the High Court dismissing their application to strike out the plaintiff's originating summons under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980 ('RHC'). The Selangor Turf Club ('club') was an unincorporated society registered under the Societies Act 1966 ('Act') and managed by a committee of eight ordinary members pursuant to r. 20(a) of the club's constitution, with defendants 1 to 5 and 7 being such committee members for the years 2003-2005. The plaintiffs, who were ordinary members of the club, initiated a derivative action against the defendants, alleging *ultra vires*, breach of the club's constitution, breach of trust, breach of fiduciary duty and negligence in causing the club to invest the sum of RM30 million in one Fountain View Development Bhd. The defendants denied the allegations and asserted that they had powers under the constitution to make the investment, which had already been fully recovered, with an investment return of approximately RM2.376 million. The defendants challenged the plaintiffs' *locus standi* and competency in bringing the derivative action on behalf of the club, which was an unincorporated association or society. The High Court upheld the plaintiff's derivative action. The issue that had to be decided in this appeal was whether the plaintiff's action should be commenced by a derivative action or a representative action.

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Held (allowing the appeal in part)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) Both parties herein appeared to have a common ground when they jointly relied on the case of *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* ('*Raintree Club case*'). Raintree Club was an unincorporated society registered under the Act, whose members brought a representative action against the defendants-appellants as promoters of the club for damages due to a breach of fiduciary duty in relation to a share acquisition agreement. Both the High Court and the Court of Appeal held that the procedural device of a representative action provided the right answer. The *Raintree Club case* was on the same footing as the club in the instant appeal as both were unincorporated societies under the Act. The plaintiffs' reliance on the *Raintree Club case* was apparently an affirmation that the proper action to be commenced by the plaintiffs was a representative action and, hence, an abandonment of the plaintiffs' contention based on the applicability of a derivative action. The judgment of the High Court, which had become the subject matter in this appeal, had focused exclusively on the applicability of a derivative action to the exclusion of a representative action. The *ratio* in the *Raintree Club case* should be followed and a representative action was the answer to the instant appeal. A representative action was provided for under O. 15 r. 12 of the RHC. Since the plaintiffs' cause of action had never been doubted, it was abundantly clear that O. 18 r. 19(1)(a), (b) or (d) of the RHC had no application. Therefore, there was no question of striking out the plaintiffs' action. (paras 24, 25, 26, 27, 28 & 29)

[Derivative action set aside and substituted by representative action.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan-defendan terhadap keputusan Mahkamah Tinggi kerana menolak permohonan mereka untuk membatalkan saman pemula plaintif di bawah A. 18 k. 19(1)(a), (b) atau (d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Kelab Lumba Kuda Selangor ('kelab') adalah sebuah pertubuhan tak diperbadan di bawah Akta Pertubuhan 1966 ('Akta') yang diurus oleh satu jawatankuasa yang terdiri dari lapan ahli biasa di bawah

k. 20(a) perlembagaan kelab, di mana defendan-defendan 1 hingga 5 dan defendan 7 adalah ahli-ahli jawatankuasa tersebut bagi tahun 2003-2005. Plaintif-plaintif, yang merupakan ahli biasa kelab, memulakan satu tindakan derivatif terhadap defendan-defendan, sekaligus mendakwa *ultra vires*, pelanggaran perlembagaan kelab, pecah amanah, pelanggaran tanggungjawab fidusiari dan cuai dalam menyebabkan kelab melaburi sebanyak RM30 juta dalam syarikat yang bernama Fountain View Development Bhd. Defendan-defendan menolak alegasi sambil berhujah bahawa mereka mempunyai kuasa di bawah perlembagaan untuk membuat pelaburan, yang telahpun memberikan pulangan balik modal serta keuntungan sebanyak lebih kurang RM2.376 juta. Defendan-defendan mencabar *locus standi* dan kekompetenan plaintif-plaintif untuk membawa tindakan derivatif bagi pihak kelab, yang merupakan sebuah pertubuhan tak diperbadan atau kesatuan. Mahkamah Tinggi membenarkan tindakan derivatif plaintif-plaintif. Isu yang berbangkit di rayuan ini adalah sama ada tindakan plaintif-plaintif harus dimulakan melalui tindakan derivatif ataupun representatif.

Diputuskan (membenar rayuan sebahagiannya)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Kedua-dua pihak di sini nampaknya mempunyai dasar hujah yang sama bilamana mereka bergantung kepada kes yang sama, iaitu *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* ('kes *Kelab Raintree*'). Kelab Raintree adalah sebuah persatuan tak diperbadan yang didaftar di bawah Akta, di mana ahli-ahlinya memulakan tindakan representatif terhadap defendan-defendan/perayu-perayu selaku promoter kelab untuk menuntut gantirugi kerana pelanggaran tanggungjawab fidusiari berhubung dengan satu perjanjian pemerolehan saham. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan memutuskan bahawa kaedah prosedur yang ada pada tindakan representatif telah menyediakan jawapannya yang tepat. Kes *Kelab Raintree* berada dalam kedudukan yang sama seperti kelab di rayuan di sini kerana kedua-duanya adalah persatuan tak diperbadan di bawah Akta. Kebergantungan plaintif-plaintif kepada kes *Kelab Raintree* menunjukkan satu pengakuan bahawa tindakan yang teratur yang harus diambil oleh plaintif-plaintif adalah tindakan

representatif, sekaligus meninggalkan hujah yang berdasar kepada pemakaian tindakan derivatif. Keputusan Mahkamah Tinggi, yang menjadi pokok rayuan di sini, secara ekslusif memfokus kepada keterpakaian tindakan derivatif dan menyingkir penggunaan tindakan representatif. *Ratio* di dalam kes *Kelab Raintree* harus diikuti dan tindakan representatif adalah jawapannya kepada rayuan di sini. Tindakan representatif ada diperuntukkan di bawah A. 15 k. 12 KMT. Oleh kerana kausa tindakan plaintif-plaintif tidak pernah dipertikai, maka A. 18 k. 19(1)(a), (b) atau (d) KMT jelas tidak terpakai. Oleh itu soal membatalkan tindakan plaintif-plaintif adalah tidak berbangkit.

[Tindakan derivatif diketepikan dan diganti dengan tindakan representatif.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Cotter v. National Union of Seamen [1929] 2 Ch 58 ***(refd)***

Edwards v. Halliwell [1950] 2 All ER 1964 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Hui Huat v. Datuk Khoo Eng Choo & Ors [1999] 3 CLJ 777 HC ***(refd)***

Taylor & Anor v. National Union of Mineworkers (Derbyshire Area) & Ors [1985] BCLC 237 ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(foll)***

Legislation referred to:

Companies Act 1965, s. 16(5)

Co-operative Societies Act 1993, s. 9

Rules of the High Court 1980, O. 15 r. 12, O. 18 r. 19(1)(a), (b), (d)

Other source(s) referred to:

Walter Woon, *Company Law,* 2nd edn, p 51

For the appellants/defendants - Dato' V Sithambaram; M/s Sitham & Assoc
For the respondents/plaintiffs - Tommy Thomas; M/s Tommy Thomas

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 20 September 2006, the learned judge of the Kuala Lumpur High Court dismissed the application of the appellants-defendants ("the defendants") which sought to strike out the originating summons of the respondent-plaintiff' ("the plaintiff") under O. 18 r. 19(1)(a), (b) or (d) of the Rules of the High Court 1980.

[2] In essence, O. 18 r. 19(1)(a), (b) or (d) empowers the court at any stage of the proceedings to eg, strike out any action on the ground that it discloses no reasonable cause of action; or is scandalous, frivolous or vexatious; or is otherwise an abuse of the process of the court, respectively.

[3] The defendants have now appealed against that decision.

Factual Background

[4] The Selangor Turf Club ("the club") is an unincorporated society registered under the Societies Act 1966.

[5] The club is governed by its constitution and rules, which operate as a contract between the club and its members, and between the members *inter se*.

[6] The club is managed by a committee of eight ordinary members pursuant to r. 20(a) of the club's constitution. Defendants 1 to 5, and 7 are such committee members for the years 2003-2005.

[7] The plaintiffs are ordinary members of the club. They initiated a derivative action against the defendants alleging *ultra vires*, breach of the club's constitution, breach of trust, breach of fiduciary duty and negligence in causing the club to invest the sum of RM30 million in Fountain View Development Bhd.

[8] The defendants denied the above allegations, and asserted that they have powers under the constitution to make the investment, which has already been fully recovered, with an investment return of approximately RM2.376 million.

Derivative Action

[9] The defendant's learned counsel Dato' V. Sithambaram challenged the plaintiff's *locus standi* and competency in bringing the derivative action on behalf of the club, which is an unincorporated association or society. He referred to, *inter alia*:

(1) *Foss v. Harbottle* [1843] 2 Hare 461; 67 ER 189;

(2) *Cotter v. National Union of Seamen* [1929] 2 Ch. 58;

(3) *Taylor & Anor v. National Union of Mineworkers (Derbyshire Area) & Ors* [1985] BCLC 237;

(4) *Abdul Rahim bin Aki @ Mohd Haki v Krubong Industrial Park (Melaka) Sdn. Bhd & 5 Ors* [1995] 4 CLJ 551 CA;

(5) Section 16(5) Companies Act 1965; and

(6) *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607. ("the *Raintree Club* case").

[10] In supporting the derivative action, Mr. Tommy Thomas, plaintiff's learned counsel relied on:

(1) *Hui Huat v. Datuk Khoo Eng Choo & Ors* [1999] 3 CLJ 777 HC; and

(2) The *Raintree Club* case *supra.*

[11] The High Court upheld the plaintiff's derivative action.

[12] In my judgment, derivative action is a procedural device which originated from the sphere of company law, with its origin in *Foss v. Harbottle, supra*, setting out the general principles, to which exceptions have been developed by the English Courts.

[13] *Foss v. Harbottle, supra,* concerns a suit brought by two shareholders of a company against *inter alia* its directors who were alleged to have misapplied and improperly used the company's property. It was held that the injury complained of was that suffered by the company which was different from its members. The proper plaintiff should have been the company and the members could not maintain such a suit. (See also Walter Woon, *Company Law*, 2nd edn. p. 51).

[14] *Foss v. Harbottle, supra,* gave rise to the proper plaintiff rule in so far as a company is concerned. In particular, this rule was subsequently stated by Jenkins LJ for the Court of Appeal in *Edwards v. Halliwell* [1950] 2 All ER 1964, at pp. 1066 and 1067. The general principles may be enumerated as follows:

(1) The proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself; and

(2) Where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter.

[15] The general principles are subject to certain exceptions, *viz*:

(a) where the act complained of is wholly *ultra vires* the company or association, because there is no question of the transaction being confirmed by any majority; and

(b) where what has been done amounts to a fraud on the minority and the wrongdoers are themselves in control of the company; the aggrieved minority are allowed to bring what is known as minority shareholders' action on behalf of themselves and all others. The rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice.

[16] In Malaysia, the nature of a derivative action was examined in *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551 CA where Gopal Sri Ram JCA observed that the derivative action is an ingenious procedural device created by courts of equity, by which the rule of judicial non-interference is overcome.

[17] His Lordship added:

> It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as

defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

Trade Unions

[18] The rule in *Foss v. Harbottle, supra*, and the exceptions allowing the filing of derivative action in relation to a company have been extended to a trade union in *Edwards v. Halliwell, supra.*

[19] Other illustrations of trade unions being allowed to take derivative actions include *Cotter, supra*; and *Taylor & Anor, supra.*

Co-operative Society

[20] Derivative action has also been applied to a co-operative society eg in *Hui Huat, supra*. There, the plaintiff filed an originating summons seeking leave to sue the first and second defendants who were formerly, on the application of Bank Negara on 7 January 1987, the court-appointed receivers ("the receivers") of the third defendant, a co-operative society. The plaintiff had alleged their wrongdoings to the co-operative society and its members. A consent order dated 1 June 1997 was entered by Bank Negara as applicant; the co-operative society as respondent; Tai Jip Keh @ Tai Min Pak as the first intervenor; and the Registrar General of Co-operative Societies as the second intervenor. The consent order had relieved the receivers from all the liabilities in respect of their actions under the receivership. In relation to the plaintiff's originating summons, Azmel J (now FCJ) followed *Abdul Rahim bin Aki, supra* and observed that the plaintiff as a member of the co-operative society could only sue the receivers by way of a derivative action, but stressed that by virtue of the consent order, the co-operative society and consequently the plaintiff as a member thereof were stopped from bringing any action against the receivers. His Lordship observed that a derivative action is not an independent cause of action but a cause of action accruing to the co-operative society for and on which behalf individual members can enforce.

[21] The central figure in *Hui Huat, supra,* was a co-operative society regulated by s. 9 of the Co-operative Societies Act 1993 in the following words:

> **9 Societies to be bodies corporate**
>
> The registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted.

[22] Section 9 of the Co-operative Societies Act 1993 clearly confers upon a co-operative society registered under the Act the capacity of a body corporate and legal entity to sue or be sued by its name, in the same manner as provided under s. 16(5) of the Companies Act 1965 in relation to a company.

Representative Action

[23] The issue which this court has to decide is whether the plaintiff's action should be commenced by derivative action or representative action.

[24] Counsel for the respective parties herein appear to have achieved a common ground when they jointly relied on the *Raintree Club* case, *supra*. Raintree Club is an unincorporated society registered under the Societies Act 1966. There, the members of the club brought a representative action against the defendants-appellants as promoters of the club for damages for breach of fiduciary duty in relation to a share acquisition agreement. Both Zakaria Yatim J (later FCJ) in the High Court, and the Court of Appeal concurrently held that the procedural device of a representative action provides the right answer. Gopal Sri Ram, JCA speaking for the Court of Appeal, observed that:

(1) the action there was instituted against those persons who were, at the material time, purporting to act in their capacity as officers of the club, namely, as office bearers and members of the pro-tem committee, for allegedly breaching the fiduciary duties that they owed the club; and

(2) due regard should also be had to the fact that it is the members of the club who are the ultimate victims of any wrongdoing on the part of the appellants; for it is they who have to pay the sum stipulated in the share acquisition agreement.

[25] The *Raintree Club* case, *supra*, is on the same footing as the club in the instant appeal in that both are unincorporated societies registered under the Societies Act 1966.

[26] The plaintiff's reliance on the *Raintree Club* case, *supra,* is apparently an affirmation that the proper action to be commenced by the plaintiff is a representative action, and hence an abandonment of the plaintiff's contention based on the applicability of a derivative action.

[27] The judgment of the High Court, which has become the subject matter in this appeal, has focused exclusively on the applicability of derivative action to the exclusion of representative action.

[28] I am of the view that the ratio in *Raintree Club* case, *supra,* should be followed and that representative action is the answer to the instant appeal. A representative action is provided for under O. 15 r. 12 of the Rules of the High Court 1980.

[29] Since the plaintiff's cause of action by way of a representative action has never been doubted, it is abundantly clear to me that O. 18 r. 19(1)(a), (b) or (d) has no application. Hence, there is no question of striking out the plaintiff's action.

Conclusion

[30] On the foregoing grounds, I allow this appeal in part. The order of the High Court allowing the plaintiff's action by way of derivative action is set aside and is substituted by a representative action under O. 15 r. 12.

[31] In the circumstances of this appeal, parties are ordered to bear their own costs here and in the court below.

A **[32]** Deposit is to be refunded to the defendants.

[33] My learned brothers Mohd Ghazali bin Mohd. Yusof, JCA and Zulkefli bin Ahmad Makinudin, JCA (now FCJ) have read this judgment in draft and have expressed their agreement with it to
B become the judgment of this court.

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